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VIA E-MAIL

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: *Applications of Sprint Nextel Corporation and SoftBank Corp., IB Docket No. 12-343;
Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269***

Dear Ms. Dortch:

On April 4, Tamara Preiss and John Scott from Verizon met with the following Commission staff: Ruth Milkman, Paul Murray, Susan Singer, Nese Guendelsberger, Monica DeLong, AJ Glusman, Catherine Matraves, John Schauble, and Joel Taubenblatt from the Wireless Telecommunications Bureau; David Krech from the International Bureau, and Jim Bird from the Office of General Counsel.

We explained that the record in these proceedings demonstrates that the Broadband Radio Service and Educational Broadband Service ("BRS/EBS") spectrum easily meets the Commission's standard for inclusion in the mobile services spectrum screen: not only is it both suitable and available for those services (the test for inclusion), it is in fact in use.¹ The Commission's long-standing policy is to assess whether spectrum at issue in a transaction is suitable and available for mobile services and thus should be included in the screen as part of its

¹ See Comments of Verizon Wireless, IB Docket No. 12-343, at 2-11 (Jan. 28, 2013); Reply Comments of Verizon Wireless, IB Docket No. 12-343, at 1-7 (Feb. 25, 2013); Comments of Verizon Wireless, WT Docket No. 12-269, at 22-27 (Nov. 28, 2012); Reply Comments of Verizon Wireless, WT Docket No. 12-269, at 8-14 (Jan. 7, 2013); Comments of AT&T Inc., WT Docket No. 12-269, at 39-42 (Nov. 28, 2012); Reply Comments of AT&T Inc., WT Docket No. 12-269, at 16-22 (January 7, 2013); Consolidated Reply to Oppositions of the Consortium for Public Education and The Roman Catholic Diocese of Erie, Pennsylvania, IB Docket No. 12-343, at 1-11 (Feb. 25, 2013); Reply Comments of DISH Network, L.L.C., IB Docket No. 12-343, at 4, 12-13, 16-19 (Feb. 25, 2013); Comments of EBS Licensees Supporting Verizon Request, IB Docket No. 12-343, at 1-7 (Feb. 12, 2013); Petition to Deny of Taran Asset Management, IB Docket No. 12-343, at 9 (Jan. 19, 2013). Indeed, a recent FCC staff report (which has been filed in these proceedings) counted all 194 MHz of BRS/EBS spectrum as available for mobile broadband. Wireless Telecommunications Bureau and Office of Engineering & Technology, *FCC White Paper, The Mobile Broadband Spectrum Challenge: International Comparisons* (released February 26, 2013). See *id.* at 6 (Table 3) and 8 (Table 5) (identifying 194 MHz of BRS/EBS spectrum as "available for mobile broadband").

review of that transaction. Under this standard, the Commission should add the EBS and remaining BRS spectrum to the screen in its review of the SoftBank-Sprint-Clearwire transfer applications.

In a recent *ex parte* filing, however, Sprint and SoftBank assert that the Commission's review of the Sprint-Softbank-Clearwire transaction is the wrong place to include the remainder of the BRS/EBS spectrum: "These proposed modifications not only lack merit, but are not transaction-specific, as the transactions do not increase the amount of spectrum already attributed to Sprint for spectrum screen and competitive analysis purposes and, thus, there is no need to evaluate them under the spectrum screen."² Sprint and SoftBank do not explain why adding the BRS/EBS spectrum to the screen lacks merit -- nor could they, given that they have touted acquiring full control of that spectrum as strengthening their competitive position.

Sprint and SoftBank cannot have it both ways -- contending on the one hand that control of this spectrum is a key pro-competitive benefit of the transaction, while simultaneously arguing that the Commission should ignore this spectrum in its competitive review. They are also wrong to claim that correcting the screen is unwarranted because the EBS/BRS spectrum is already attributed to Sprint. This claim is in any event irrelevant to whether the screen should be increased to add suitable and available spectrum as part of the Commission's review of this transaction.

First, this transaction involves whether *SoftBank* should be attributed *for the first time* with BRS/EBS and other spectrum, through its acquisition of control of Sprint and thus control of Clearwire's BRS/EBS spectrum.³ SoftBank is no differently situated than AT&T when AT&T sought approval last year to acquire WCS spectrum.⁴ The Commission decided that the WCS spectrum AT&T was acquiring was available for mobile services, increased the spectrum screen to include WCS, and used that revised screen to conduct its competitive analysis.⁵

² Letter to Marlene H. Dortch from Regina M. Keeney and John R. Feore, IB Docket 12-343, filed March 12, 2013 ("Sprint/SoftBank Ex Parte Letter"), at 4.

³ Sprint and SoftBank state that "SoftBank owns no attributable interests in U.S. spectrum licenses or leases" Sprint/SoftBank Ex Parte Letter at 3. And the Wireless Bureau summarized their amended transfer application to include the BRS/EBS spectrum as follows: "[T]he Applicants seek Commission consent for the transfer of *de facto* as well as *de jure* control of Clearwire's licenses, leases and authorizations to *SoftBank*, through its proposed 70 percent ownership of Sprint." Public Notice, IB Docket No. 12-343, 27 FCC Rcd 16056, 16058 (WTB 2012) (emphasis added).

⁴ Applications of AT&T Mobility Spectrum LLC et al. for Consent to Assign and Transfer Licenses, WT Docket No. 12-240, 27 FCC Rcd 16459 (2012).

⁵ *Id.* There the Commission noted that it had "initiated a review of our policies toward mobile spectrum holdings. In the *Mobile Spectrum Holdings NPRM*, we noted, though, that during the pendency of the rulemaking proceeding, we would continue to apply our current case-by-case approach to evaluate mobile spectrum holdings in secondary market transaction and initial spectrum licensing after auctions. Historically, as part of this case-by-case approach in transactions, we consider whether to modify the spectrum screen." *Id.* at para 30 (footnotes omitted).

Similarly, SoftBank is acquiring control of BRS/EBS spectrum, and there is no serious claim that the spectrum is not available for mobile services. The Commission should thus find that the BRS/EBS spectrum is available for mobile services, increase the screen to reflect that fact, and use the revised screen to conduct its competitive analysis.

Second, contrary to the Sprint-SoftBank *ex parte*, Sprint in fact is *not* attributed with most of this spectrum for purposes of spectrum aggregation, for the simple reason that most of that spectrum has *not been included* in the screen. Sprint has been attributed with only the BRS spectrum it controls (none of the EBS spectrum) and only where that spectrum matches the 55 MHz of the BRS spectrum that to date has been included in the screen. This omits as much as 139 MHz of additional spectrum that should be counted. The purpose of the screen is to enable the Commission to identify transactions that may raise competitive issues. The current screen fails that purpose because it omits a substantial amount of spectrum that is being used to compete.

Third, Sprint and SoftBank do not explain why the past attribution of limited BRS spectrum to Sprint has anything to do with the Commission's standard practice of assessing the input market for spectrum in each transaction. That assessment determines whether the amount of spectrum included in the screen should be updated to reflect changes in available spectrum. Unless the screen includes all spectrum that is available, it fails as a valid analytical tool. The Commission cannot conduct a fact-based spectrum input analysis in this transaction (which involves BRS/EBS spectrum) by turning a blind eye to the fact that the BRS/EBS spectrum is in use.

During the meeting, staff asked whether it was appropriate to correct the amount of spectrum included in the screen in this transaction where SoftBank would not aggregate more spectrum than Sprint already controlled. But the question's premise is incorrect, because in fact Sprint has *not* been attributed for screen purposes with all of the suitable and available spectrum that SoftBank will control. In short, the concentration of spectrum in the hands of SoftBank relative to other carriers will materially differ if the correct screen is used.⁶ Whether or not that increased concentration raises competitive concerns is the analysis the Commission must complete, but it cannot conduct a proper analysis without evaluating *all* of the spectrum that SoftBank will control.

⁶ For this reason, Sprint and SoftBank's reliance on the Commission's review of the ATT/BellSouth merger is inapt. In support of their argument that the Commission need not conduct a spectrum screen analysis here, Sprint and SoftBank claim that "the Commission similarly did not assess ATT's acquisition of Cingular's spectrum rights in its review of the ATT/BellSouth merger because AT&T already had an attributable interest in Cingular's spectrum holdings." Sprint/SoftBank Ex Parte Letter at 4 n.11. That case, however, has no bearing on the current transaction because Cingular's spectrum had already been fully attributed to it (and to AT&T) for spectrum screen purposes. Here, by contrast, SoftBank would acquire control of spectrum that, under a valid spectrum input analysis, would be attributed to it for the first time.

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This transaction is, in short, the *right* place to correct the screen to include EBS/BRS. The facts as to this band compel it, and there is no reason not to do so. Failure to update the screen now would conflict with Commission policy and previous decisions, and would leave intact a screen that fails its purpose of providing an accurate tool for the Commission to conduct its competitive analysis of this and future transactions.⁷

This letter is being filed pursuant to Section 1.1206 of the Commission's Rules. Should you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jonathon C. Smith".

CC: (Via Email)

Ruth Milkman
Paul Murray
Susan Singer
Nese Guendelsberger
Monica DeLong
AJ Glusman
Catherine Matraves
John Schauble
Joel Taubenblatt
David Krech
Jim Bird

⁷ Verizon asks only that the Commission correct the amount of spectrum included in the screen by adding spectrum that is unquestionably suitable and available – and that is being transferred in this transaction. Verizon agrees that various proposals to modify the current screen should be addressed in the pending *Mobile Spectrum Holdings* rulemaking proceeding.